

November 1, 1999

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

REPORT AND DECISION.

SUBJECT: Department of Development and Environmental Services File No. **E9701293B**

HAROLD CHRISTIANSON
Code Enforcement Appeal

Location: 1700 – 264th Northeast, Redmond, Washington

Appellants: Harold and Carol Christianson, *represented by* **Craig D. Magnusson**,
10500 Northeast 8th Street #1900
Bellevue, WA 98004
Telephone: (425)462-7070 Facsimile: (425)646-3467

Intervenor: **William Harper**,
16541 Redmond Way PMB #140
Redmond, WA 98052-4482
Telephone: (425)868-8028

King County: Department: Development and Environmental Services, *represented by*
Manuela Winter and **Lamar Reed**
900 Oakesdale Avenue Southwest
Renton, WA 98053
Telephone: (206)296-7294 Facsimile: (206)296-6613

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:

Deny the appeal

Department's Final Recommendation:

Deny the appeal

Examiner's Decision:

Deny in part, grant in part

PRELIMINARY MATTERS:

Notice of appeal received by Examiner:

April 23, 1999

Statement of appeal received by Examiner:

April 23, 1999

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:

June 7, 1999

Hearing Opened:

September 2, 1999

Hearing Closed:

October 27, 1999

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Buffers
- Streams
- Trees
- Grading
- Sensitive area code exemptions

SUMMARY:

Appeal from notice and order regarding conflict between sensitive areas buffer requirements and historic use; denied in part, granted in part.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. **Notice and Order Served.** This case comes before the Examiner pursuant to a supplemental notice and order served upon Harold Christianson (the "Appellant") on March 10, 1999.¹ This supplemental notice and order (Exhibit No. 6) cites the Appellant for the following violations of King County code:²

- The accumulation of wrecked, dismantled or inoperable vehicles, travel trailer and campers.

¹ . The notice and order is "supplemental" because it replaces a previously issued notice and order on the same property. The appeal of the previously issued notice and order was dismissed for lack of timeliness. The Department of Development and Environmental Services subsequently issued the "supplemental" notice and order upon determining a change in site circumstances. Neighboring property owner William Harper, accepted in these proceedings as Intervenor, objected to the supplemental notice and order, arguing that the matter had been previously decided by the dismissal of the earlier notice and order. The Examiner ruled that, due to the change in circumstances upon the subject property identified by the Department, the principal of *res judicata* did not apply.

² KCC sections 16.82.060; 21A.18.110.J; 21A.32.230; 21A.24; 23.10.040; and, Uniform Housing Code (UHC) section 1001.11.

- Parking and storage of vehicles non-improved surfaces;
 - Maintenance of hazard and/or unsanitary premises;
 - Clearing and/or grading within a sensitive area (a salmon bearing stream) without the required permits and/or approvals.
2. **Notice and Order Appealed.** On March 22, 1998, Harold Christianson filed timely appeal (Exhibit No 7), contesting each of the cited violations. The issues necessary to consider in this review, however, subsequently were narrowed in the manner described in Finding No. 3, following.
3. **Review Issues Excluded.** Most of the issues in the March 10, 1999 supplemental notice and order have been resolved without review in this proceeding.
- a. The Department and the Appellant have obtained settlement regarding the storage of wrecked, dismantled or inoperable vehicles and UHC violations regarding hazardous or unsanitary conditions.
 - b. The Department supports a waiver of the \$1,000 initial civil penalty assessed against the Appellant. In other similar cases, the Examiner has found that the practice of assessing an immediate civil penalty (rather than assessing one only after the expiration of a mandatory compliance period) has proved to be "unworkable at worst, cumbersome at best." The Department has abandoned the practice of assessing civil penalties upon service of notice and order. Thus, that practice is now deemed by the Department as a "trial period". In other similar cases the Examiner has found these facts to constitute "compelling new information" (a criterion for waiving civil penalties; KCC 23.32.050) warranting waiver of civil penalties assessed in that manner.
 - c. The Examiner dismissed grading and clearing issues beyond the 100-foot wide sensitive areas protection buffer because the March 10, 1999 supplemental notice and order fails to cite such activities. In so doing, it is observed that KCC 16.82.050 sets the criteria for when a clearing and grading permit is required. Relevant to the case at hand, a grading permit must be required for the importation, excavation or movement of 100 cubic yards or more. Although this issue is not subject to review here (except as it may apply to work conducted within the 100-foot wide sensitive area protective buffer) the issue nonetheless must be addressed administratively by the Department and Appellant Christianson.
 - d. An earth fill berm, approximately 10 feet wide, extends along the east boundary of the subject property abutting 264th Avenue Northeast. The Department has endeavored to demonstrate that the berm is located within 100 feet of the protected stream by measuring the distance in paces (two of Code Enforcement Officer Winter's paces equaling 5 feet). The Appellant has endeavored to demonstrate that it is *not* within 100 feet from the stream by applying known

building foundation lengths as a measure on an oblique aerial photograph. This method is at least as imprecise as the Department's, due to the angle and depth of the photograph as well as the topography of the site. Both measures laid the 100-foot distance at approximately the toe of the berm in question. Given the impreciseness of these measurement methods, the Examiner ruled in hearing that the Department had failed to demonstrate with a preponderance of the evidence that the berm at issue lay certainly within the 100-foot protective buffer area. For that reason, the Examiner excluded any further consideration of the berm in this proceeding.

Thus, this review focuses upon the activities cited within the 100-foot wide stream protective buffer.

4. **Remaining Issue.** Was the Department's March 10, 1999 supplemental notice and order issued in error? That is, did clearing and/or grading within a sensitive area (the buffer area of a salmonid bearing stream) occur upon the subject property without required permits and/or approvals?³ Put another way, were the cited activities within 100 feet of the Class 2 salmonid bearing stream a mere continuation of an historic permitted use of the property pre-dating the 1990 adoption of sensitive area regulations?
5. **Activities at Issue.** These activities undertaken by the Appellant are at issue:
 - a. The cutting of two large cedar trees approximately 12 to 15 feet eastward from the Appellant's residence and perhaps 25 feet from the adjacent Class 2 stream.
 - b. Some hillside "disturbance" near 264th Avenue Northeast within an area referred to in the hearing record as "area A."
 - c. Some vegetation removal and tree planting within that portion of the subject property identified in this hearing record as "area B".
 - d. Alleged grading in the form of hillside cuts within those portions of the subject property identified as "area C" and "area D".

3. KCC 16.82.060 requires: "except as exempted in KC 16.82.050, no person shall do any clearing or grading without first obtaining a clearing and grading permit from the Director..." KCC 16.82.050.A.17 exempts from grading and clearing permits requirements the following (in part):

Within sensitive areas, as regulated by KCC 21A.24, the following activities are exempt from the clearing requirements of this chapter and no permit shall be required;

- a. Normal and routine maintenance of existing lawns and landscaping subject to the limitations on the use of pesticides in sensitive areas as set out in KCC 21A.24.
- b. Permitted agricultural uses; provided the clearing is consistent with the agricultural exemptions in sensitive areas as regulated in KCC 21A.24.
- c. Emergency tree removal to prevent imminent danger or hazard to persons or property.

It is noteworthy that KCC 16.82.050 contains no cubic yardage exemption for activities conducted within a "sensitive area" designated pursuant to KCC 21A.24

- e. Deposition of gravel deposits along the north bank of the stream of concern within an area identified in the hearing record as "area E."

6. **Relevant Facts.** Regarding the issues and activities of concern in this review, the following facts are relevant:

- a. A Class 2 salmonid bearing stream traverses the western third of the subject property entering at the south boundary then gradually curving toward, and discharging at, the west boundary.
- b. Numerous improvements exist within the 100-foot wide buffers on the subject property and have existed on the subject property since long before the King County adoption of sensitive areas protective regulations. Some of these improvements were built as long ago as 1934, including the residence and various sheds and outbuildings whose use has changed over the decades. King County tax records from 1940, 1967, 1970 and 1971 document these buildings and, with photographs, provide evidence of the nature and character of surrounding use of the land.
- c. Exhibit No. 23 is an oblique aerial photograph depicting most of the subject property. Although the date of that photograph is not precisely determined in the hearing record, the photograph was probably taken between 1977 and 1983--a period well prior to the 1990 King County adoption of sensitive areas protective regulations. The photograph shows the structures on the property--a work shed, a garage, and the residence--as well as then cleared areas. The cleared areas include substantial portions of "area A," "area B," "area C" and "area E". That portion of the photograph depicting the immediate environs of the residence shows some lawn areas north and west of the residence. The extent of an existing clearing south and east of the residence is difficult to ascertain due to the presence of large trees and cast shadows.
- d. Exhibit Nos. 29 and 30 are photographs indicating the location of a 1960's Corvair automobile located within a portion of "area B" is issue. This evidence, however, contains no significant landmarks by which to corroborate that interpretation. Exhibit No. 20c provides numerous photographs taken by a DDES Code Enforcement Officer. The earth cuts from a bulldozer blade or similar earth moving machinery are evident in photographs taken of "area A" (A4, A5) "area D" (photographs D3, D5 and D8). This evidence of grading occurs within areas indicated within older photographs to have been previously cleared, with the exception of the hillside cut located generally within "area D."
- e. A neighboring property owner testifies that, "with the exception of the hillside areas to the south, the Christianson property was cleared from 264th Avenue Northeast westerly to the upper bank of the small creek," since at least 1968. The neighbor's testimony observes further, "on the west side of the creek, there has always been a yard/grassy area between the creek bank and [the Appellant's] house and then further to the west, on the west bank of the creek, the land was cleared and used for gardens in some areas."

Photographs entered by an intervening neighboring property owner (Exhibit No. 25) further depict a "cut" in the general vicinity south of the residence. The same collection of photographs depict some clearing or contour alteration in other areas as well. However, those areas appear to be the same as other evidence would suggest have been similarly cleared for decades prior to a 1990 sensitive areas protection code adoption.

- f. The subject property contains approximately 2.98 acres and is classified "RA-5". This zoning classification promotes rural uses. A purpose of the rural zone is to provide for an area-wide long term rural character. KCC 21A.04.060.
 - g. The parties do not dispute the character of classification of the stream that traverses the subject property--a Class 2 salmonid bearing stream requiring a 100-foot wide protective buffer.
7. **Chronology.** The chronology indicated in the Department's preliminary report to the Examiner (Exhibit No. 1) is correct.
 8. Any of the following conclusions which may be construed as a finding, is hereby adopted and incorporated as such.

CONCLUSIONS:

1. Except as exempted in KCC 16.82.050, no person shall do any clearing or grading without first obtaining a clearing and grading permit from the [DDES] Director. KCC 16.82.060.
2. KCC 16.82.050 provides clearing and grading permit exemptions. It requires, in part, the following: A. No person shall do any clearing or grading without first having obtained a clearing and grading permit from the Director except for the following:

...Paragraph 17. Within sensitive areas as regulated in KCC 21A.24, the following activities are exempt from the clearing requirements of this chapter and no permit shall be required:
 - a. Normal and routine maintenance of existing lawns and landscaping...
 - b. Permitted agricultural uses;...
 - c. Emergency tree removal to prevent imminent danger or hazard to persons or property.
3. The preponderance of the evidence supports a conclusion that the activities undertaken by the Appellant were within established rural use areas substantially prior to adoption of the sensitive areas code in 1990. Those areas include "area A," "area B" and "area E".
4. Within the cleared area southeast of the residence within "area C," the evidence is uncertain. Neither the Appellant nor the Department has clearly shown the nature, character, history or other

relevant aspects of that area. In such a case, the Examiner must find in favor of the Appellant-- the Department having not sufficiently made its case in support of the notice and order.

5. The preponderance of evidence clearly and distinctly shows controlled activity (grading/cutting) to have occurred within "area D"--activity which obviously has intruded within a previously undisturbed or minimally disturbed vegetated hillside.
6. The preponderance of evidence further demonstrates that the cutting of two large cedar trees within 10 to 15 feet eastward of the Appellant's residence occurred within a yard area established before 1990.
7. In summary, then, the only cited activity supported by a preponderance of the evidence is that grading/cutting which occurred southwest of the residence within that area identified in this hearing record "area D." It is conceivable, and logical, that the area within "area C" located southeast of the existing residence may also have experienced unlawful clearing. However, the preponderance of the evidence does not support such a conclusion and therefore any aspect of the notice and order which might have been intended to apply to that area will not be mentioned in the order which follows below. Nor will any portion of areas A, B or E. Nor will the order below refer to the tall cedar cutting within the front yard of the Appellant's residence. The cutting of a tree or trees within a long-established yard area (pre-dating 1990) requires no permit or special review.

DECISION:

- A. Regarding that portion of "area D" located southwest from the existing residence, the appeal is DENIED and the Department's March 10, 1999 supplemental notice and order AFFIRMED.
- B. In all other areas of the subject property (areas A through C and E) the appeal is GRANTED and the March 10, 1999 supplemental notice and order REVERSED.
- C. The \$1,000 civil penalty assessed against the Appellant is WAIVED.

ORDER:

1. The Appellant (property owner) shall apply for and obtain a valid grading permit complete with restoration plan for that portion of "area D" (as identified in the hearing record) located southwest from the existing residence.
2. A complete application, complete with all fees then due, shall be filed with the Department no later than close of business, February 29, 2000.
3. The Appellant (property owner) shall complete those measures authorized and required by the Department's grading/clearing review for "area D" no later than 5 months following the Department's permit issuance.

4. Failure to comply with this order shall result in civil penalties, abatement and other enforcement actions authorized by KCC Title 23 as deemed appropriate by the Department and the King County Prosecuting Attorney, Civil Division.

RECOMMENDATION:

This report, decision and order recognizes those boundaries within areas A, B, C and E as established historically "grand-fathered" use areas. If the Appellant and the Department do not devise and agree upon some mapped documentation which recognizes those areas, then disputes such as the instant one will continue to arise again and again. Particularly, the widest buffer possible abutting the stream must be demarcated and protected--consistent with historic use.

ORDERED this 1st day of November, 1999.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 1st day of November, 1999, to the following parties and interested persons:

Harold & Carol Christianson
1700 - 264th Ave. NE
Redmond, WA 98053

Patrick D. & Mary C. O'Brien
8034 S. 117th St.
Seattle, WA 98178

Ken Hutchinson
1618 - 264th Ave. NE
Redmond, WA 98053

Craig Magnusson, Attorney at Law
10500 NE 8th St. #1900
Bellevue, WA 98004

Manuela Winter
DDES/LUSD
MS 1B

Elizabeth Deraitus
DDES/Code Enforcement
MS 1B

William Harper
16541 Redmond Wy. PMB 140
Redmond, WA 98052-4463

Lamar Reed
DDES/Code Enforcement
MS 1B

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE SEPTEMBER 2, SEPTEMBER 30, OCTOBER 1, AND OCTOBER 25, 1999 PUBLIC HEARINGS ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO: E9701293B – HAROLD CHRISTIANSON:

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Manuela Winter and Lamar Reed. Participating in the hearing and representing the Appellant was Craig Magnuson. Other participants in

this hearing were Harold and Carol Christianson, William Harper, and W. T. Albro.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Staff Report to Hearing Examiner
- Exhibit No. 2 Copy of Notice and Order, issued December 18, 1997
- Exhibit No. 3 Copy of Appeal dated January 1, 1998
- Exhibit No. 4 Copy of memo to James O'Connor, dated January 15, 1998
- Exhibit No. 5 Copy of Notice of Pre-Hearing Conference and Motion to Dismiss, dated January 29, 1998
- Exhibit No. 6 Copy of Supplemental Notice and Order, issued March 10, 1999
- Exhibit No. 7 Copy of Appeal receipt dated March 22, 1999
- Exhibit No. 8 Copy of Pre-Hearing Order, dated June 14, 1999
- Exhibit No. 9 Copy of Pre-Hearing Order Amendment/Errata dated June 15, 1999
- Exhibit No. 10 Copy of Hearing Examiner's Decision on Petition to Intervene dated June 23, 1999
- Exhibit No. 11 Copy of William Harper's Petition for Intervenor status dated June 9, 1999
- Exhibit No. 12 Copy of memo to Stan Titus, dated June 14, 1999
- Exhibit No. 13 Copy of Decision on Motion to Dismiss Supplemental Notice and Order, dated July 1, 1999
- Exhibit No. 14 Copy of letter from William Harper, dated May 31, 1999
- Exhibit No. 15 Copy of Notice of Pre-Hearing Conference, dated May 12, 1999
- Exhibit No. 16 Copy of letter of complaint to Code Enforcement, dated November 15, 1997
- Exhibit No. 17 Copy of previous Code Enforcement case file #87-331
- Exhibit No. 18 Excerpt from Kroll Map depicting Harper and Christianson properties, as amended by the Hearing Examiner.
- Exhibit No. 19 Photos of site, taken by Lamar Reed, dated June 19, 1999
- Exhibit No. 20a Winter's amendment to Preliminary Report
- Exhibit No. 20b Rough sketch of areas at issue by Winter
- Exhibit No. 20c Photos A1-E1 by Winter dated August 10, 1999
- Exhibit No. 20d Camera direction annotation to Exhibit 20b by Winter
- Exhibit No. 21 Aerial photos (entered by reference; two color copies for year 1990 and five black/white photos for years 1936, 1970 and 1985—7 photos total)
- Exhibit No. 22 Excerpt, "The Engineer's Manual", Hudson, 2nd edition, pp.14-15, 18-19
- Exhibit No. 23 Aerial photo of Christianson property with white tape markings
- Exhibit No. 23a Folded yellow paper attached to Exhibit 23.
- Exhibit No. 24 Declaration of W. Thomas Albro
- Exhibit No. 25 Harper photographs 1-12 (6 pages) of subject property
- Exhibit No. 26 Time Line Chart by William Harper
- Exhibit No. 27a Septic site permit application excerpt; site map
- Exhibit No. 27b Septic site application – Christianson
- Exhibit No. 28 Assessors records of subject property (8 pages)
- Exhibit No. 29 Color copy of a photograph of a 1960's era Corvair parked in front of a trailer-like structure
- Exhibit No. 30 Christianson annotations to Exhibit 23.

RST:sje

Code enf\E9701293B RPT